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Supreme Court, U. S.
FILED
JUL 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

ROBERT JAY CARLTON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL F. CYCMANICK
JAMES M. RUSS
Law Offices of James M. Russ
441 First Federal Building
Orlando, Florida 32801
Telephone: (305) 424-3681

Attorneys for Petitioner

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No.

ROBERT JAY CARLTON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Robert Jay Carlton, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 2, 1972, denying a petition for rehearing directed to that Court's written opinion dated February 3, 1972. The initial Fifth Circuit opinion affirmed a judgment and commitment entered on April 1, 1970, by the United States District Court for the Middle District of Florida, in a criminal prosecution brought against the petitioner and others. The opinion of the United States Court of Appeals for the Fifth Circuit upheld the District Court's denial of a motion

to suppress evidence on grounds that the petitioner did not have standing to complain with respect to one series of illegal search and seizure activities and that a subsequent warrantless search and seizure conducted at a different location was valid because of the petitioner's consent. A timely petition for rehearing was denied by the Court of Appeals and judgment was entered. The petitioner now prays that this Court review the judgment and decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The February 3, 1972, opinion of the United States Court of Appeals for the Fifth Circuit with the petitioner prays that this Court review is not yet reported. This opinion is set out in the Appendix to this petition.

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing is also not presently reported. This opinion is, however, set out in the Appendix to this petition.

JURISDICTION

The initial decision of the Court of Appeals was entered on February 3, 1972, affirming petitioner's conviction dated April 1, 1970. The Court of Appeals denied a timely petition for rehearing on June 2, 1972. This petition for certiorari is filed within thirty (30) days of the date of entry of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a warrantless search may be validated by consent when armed and uniformed officers have taken an accused into custody and, without providing warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), seek permission to search without informing the accused that a search could not and would not be conducted unless consent was given.

2. Whether the United States Court of Appeals for the Fifth Circuit followed *Jones* v. *United States*, 362 U.S. 257 (1960) in holding that the petitioner was without standing to complain of a series of illegal searches and seizures notwithstanding the fact that the petitioner alleged his interest in the premises searched and the property seized in the trial court and the issue had never been disputed by the government either in the trial court or in its brief and argument on appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Fourth Amendment to the United States Constitution applicable here, state:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . ."

STATEMENT OF THE CASE

Petitioner was a co-defendant in a criminal prosecution instituted in the United States District Court

for the Middle District of Florida. He was charged with conspiring with others to melt United States silver currency in violation of 18 U.S.C. §2, 31 U.S.C. §395, 31 CFR §82, and 18 U.S.C. §371. The petitioner and co-defendants were found guilty by jury on January 31, 1970; judgments and commitments were entered and filed by the District Court on April 1, 1970.

On February 3, 1972, the United States Court of Appeals for the Fifth Circuit reversed convictions of all defendants, except the petitioner's because vast quantities of evidence seized from an alleged smelting site near Orlando, Florida, had been obtained by the government through illegal searches and seizures. The Court of Appeals, however, held petitioner's conviction to be valid by ruling that he had no interest in the site or property seized.

Prior to trial, motions seeking the suppression of this particular evidence and also evidence seized at other locations had been filed by the petitioner. The petitioner's motion specifically alleged his interest in the premises which had been invaded and in the property that was seized.

The petitioner had also challenged the validity of search and seizure activities undertaken by the government in connection with the same case at the Teterboro Municipal Airport in Teterboro, New Jersey. In connection with this event, the petitioner testified that he volunteered and gave permission to search an airplane simply because he was directed to do so by agents of the Secret Service. The petitioner further tes-

tified that the agents told him they had authority to do with him as they chose and that unless he cooperated, the agents were going to put him in jail on a very high bond. The agents did not inform the petitioner that without his consent a search of the aircraft could not and would not be conducted.

In affirming the petitioner's conviction, the United States Court of Appeals for the Fifth Circuit made the factual determination that the petitioner "claimed no interest in the site or in the property subjected to either searches or to seizures." (Slip sheet opinion page 13). This determination was made by the Court of Appeals notwithstanding the fact that the petitioners motion to suppress clearly alleged his interest in the premises and property and his allegations were not disputed by the government either in the trial court or on appeal.

In connection with the Teterboro Airport search, the Court of Appeals determined that the petitioner's consent was voluntary although the petitioner had not been advised that no search would take place if permission had been declined by him. The Court stated:

> "We do not read *Perkins* v. *Henderson*, 418 F. 2d 441 (5 Cir. 1969), to require that an officer state affirmatively that he will not search if permission is refused or that he cannot and will not search without consent."

REASONS FOR GRANTING THE WRIT

I

A Warrantless Search May Not Be Validated By Consent When Armed And Uniformed Officers Have Taken An Accused Into Custody And, Without Providing Warnings Required By *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Seek Permission To Search Without Informing The Accused That A Search Could Not And Would Not Be Conducted Unless Consent Was Given.

In this Court's decision of *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), it was expressly determined that:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority . . ." 391 U.S. at 548 and 549.

Providing consent to a search is, of course, exercising a waiver of a fundamental constitutional protection. This waiver is meaningless and not voluntarily provided where it is not established that the citizen has knowledge of the right that he is relinquishing and abandoning. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

This Court has recently decided to take jurisdiction of a case presenting the identical Fourth Amendment

question urged here. *Bustamonte* v. *Schneckloth*, 448 F.2d 699 (9 Cir. 1971); cert. granted February 28, 1972, *Schneckloth* v. *Bustamonte*, No. 71-732. In *Bustamonte*, the Ninth Circuit reiterated the principles established in its previous decisions of *Schoepflin* v. *United States*, 391 F.2d 390 (9 Cir. 1968) and *Cipres* v. *United States*, 343 F.2d 95 (9 Cir. 1965). The essential holding of all three of these cases is to the effect that a mere verbal expression of consent is insufficient to validate a warrantless search. The circumstances surrounding the furnishing of consent must also reflect a clear and knowledgeable election to grant permission which the citizen knows may be effectively withheld.

The petitioner in the instant case does not suggest that a formalistic litany is necessary in order for police officers to secure valid consent to proceed with a search. On the other hand, valid consent cannot be truly established unless there is record indication that the citizen is advised that no search can take place if his permission is declined. This is so because no sane man who denies his guilt would actually be willing to freely and voluntarily allow a search. See *Higgins* v. *United States*, 209 F.2d 819 (D.C. Cir. 1954); *Judd* v. *United States*, 190 F.2d 649 (D.C. Cir. 1951); and *Channel* v. *United States*, 285 F.2d 217 (9 Cir. 1960).

In the absence of a specific showing that the citizen knew that his consent could be withheld and that upon exercising this prerogative no search could take place, an intelligent relinquishment of fundamental Fourth Amendment protections simply cannot be found. The petitioner submits that United States Court of Appeals

for the Fifth Circuit's own decision *Perkins* v. *Henderson*, 418 F.2d 441 (5 Cir. 1969) clearly requires some showing of knowledge on the citizen's part of his right to refuse permission to search before it can be said that he voluntarily relinquished it.

In order for a warrantless search to be sustained where the prosecutor argues consent and waiver numerous other decisions require a showing that the citizen had knowledge that permission to search could be refused by him and if consent were declined no search would take place. *Bustamonte* v. *Schneckloth*, 448 F.2d 699 (9 Cir. 1971) cert. granted January 10, 1972, in *Schneckloth* v. *Bustamonte*, No. 71-732; *Perkins* v. *Henderson*, 418 F.2d 441 (5 Cir. 1969); *Schoepflin* v. *United States*, 391 F.2d 390 (9 Cir. 1968); *Cipres* v. *United States*, 343 F.2d 95; (9 Cir. 1965); *United States* v. *Menke*, 339 F.Supp. 1023 (W.D. Penn. 1972); *United States* v. *Elrod*, 318 F.Supp. 524 (E.D. La. 1970); *United States* v. *Shropshire*, 271 F.Supp. 521 (E.D. La. 1967).

In cases such as the present, an intelligent and voluntary waiver cannot be found under circumstances where a citizen is confronted and restrained by armed and uniformed officers, not advised of even his *Miranda* warnings, threatened with incarceration under high bond unless cooperation is provided, and where he testifies that he simply followed directions because he didn't feel he had any choice.

Consequently, this Court should grant certiorari in order to announce that a warrantless "consent" search cannot be authorized under the Fourth Amendment

under circumstances where the citizen is detained by armed and uniformed officers, is not provided with *Miranda* warnings and is not advised that no search would be conducted if his consent was refused.

II

The United States Court Of Appeals For The Fifth Circuit Failed To Follow This Court's Decision In *Jones* v. *United States*, 362 U.S. 257 (1960) In Holding That The Petitioner In The Instant Case Was Without Standing To Complain Of A Series Of Illegal Searches And Seizures Notwithstanding The Fact That The Petitioner Had Alleged His Interest In The Premises Searched And The Property Seized In The Trial Court And The Issue Had Never Been Disputed By The Government Either In The Lower Court Or In Its Brief And Argument On Appeal.

In *Jones* v. *United States*, 362 U.S. 257 (1960), this Court, in announcing the necessity of standing an order for one to urge a violation of Fourth Amendment protections, stated:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed, that he establish, that he himself was the victim of an invasion of privacy." 362 U.S. at 261.

In the instant case, the petitioner had filed a pretrial motion to suppress under the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure. The motion specifically alleged that he was a person aggrieved by unlawful searches and seizures including those at the secured location and premises of the alleged smelting site near Orlando, Florida. He further requested entry of an order returning to him tangible items seized through these searches and seizures. The decision of the United States Court of Appeals for the Fifth Circuit held that the government had employed illegal searches and seizures at this location in gathering its evidence which was presented at trial in this case.

At no point during the course of pretrial hearings on motions to dismiss, the two jury trials which were conducted with reference to this indictment, or in the briefs and arguments on appeal was it ever contended by the government that the petitioner was without standing to complain of these activities. His standing had been alleged and established and was never considered to be an issue in this case until the Fifth Circuit's rather startling decision of February 3, 1972, was announced.

A petition for rehearing was filed in the Court of Appeals on petitioner's behalf. Appended to the petition were the affidavits of the petitioner and co-defendant Errol Resnick, which affirmatively showed that the petitioner did, indeed, have a direct interest in the property which had been searched and seized. No opposing affidavits were presented in the government's response to the petition for rehearing. Notwithstanding

the fact that the question of petitioner's standing had never been contested and that the Appendix to his petition for rehearing affirmatively established his standing, the United States Court of Appeals for the Fifth Circuit adhered to its initial opinion.

This Court has recently granted certiorari and heard arguments in *Combs* v. *United States*, No. 71-517. The *Combs* case also presented, as an additional question, the issue of the propriety of an appellate determination on a question of standing where the government had never disputed the matter in the trial court. The petitioner respectfully submits that the United States Court of Appeals for the Fifth Circuit has failed to follow this Court's decision in *Jones* v. *United States*, 362 U.S. 257 (1960) in deciding the question of standing where the petitioner's allegations had never at all been disputed by the government at any stage in the case.

CONCLUSION

In view of the considerations set forth above, we respectfully submit that the petition for writ of certiorari be granted. The petitioner would further urge that this cause be consolidated with *Schneckloth* v. *Bustamonte*, No. 71-732, in connection with the consent to search issue which is similar in both cases.

Respectfully submitted,

MICHAEL F. CYCMANICK
JAMES M. RUSS

Law Offices of James M. Russ
441 First Federal Building
Orlando, Florida 32801
Telephone: (305) 424-3681

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of June, 1972, copies of this Petition for Writ of Certiorari were mailed to the Honorable Kendell Wherry, Assistant United States Attorney, United States Courthouse and Post Office Building, Orlando, Florida and to the Honorable Erwin N. Griswold, Solicitor General of the United States, Office of the Solicitor General, United States Department of Justice, Washington, D. C. 20530.

Attorney

CERTIFICATE OF ATTORNEY

I, MICHAEL F. CYCMANICK, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on February 22, 1972.

Attorney

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29706

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ERROL B. RESNICK, ROBERT JAY CARLTON,
JOHN THOMAS SIMPSON and
JOHN PHILLIP DAVIS,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(February 3, 1972)

Before GODBOLD, SIMPSON and CLARK,
Circuit Judges.

GODBOLD, Circuit Judge: Appellants were charged with melting silver currency of the United States in violation of 18 U.S.C. § 2, 31 U.S.C. § 395, 31 C.F.R. § 82, and 18 U.S.C. § 371, and conspiracy to commit that substantive offense. On January 31, 1970, Resnick

was found guilty of both charges, Carlton of only the conspiracy charge and Davis and Simpson of only the melting charge. All appeal.

The major questions before us concern searches and seizures near Orlando, Florida, at Teterboro, New Jersey airport, and at Kennedy Airport in New York City. Pretrial motions to suppress were denied, and fruits of the searches and seizures were used at trial. The convictions of Resnick, Davis and Simpson must be reversed because of invalidity of searches and seizures occurring in Florida.

I. The Florida Searches and Seizures

We set out the facts as revealed by the hearing on motions to suppress. In late February 1969, after learning that an unusually large number of coins were being air-shipped to Orlando federal officers began an investigation, with Secret Service Agent William Williamson in charge. At the Orlando airport they examined airbills and learned that Resnick was the consignee on numerous large incoming shipments of coins from all over the United States. They commenced surveillance over such incoming shipments. They observed a pickup truck and an ambulance picking up various coin shipments at the airport, and at times they followed those vehicles to Resnick's home in Orlando.

On March 11, 1969, about two weeks after the investigation commenced, agents saw the truck pick up a shipment of coins at the airport and proceed, heavily

loaded, to Resnick's home, and from there to a fenced tract of densely wooded land, located on a public road 10 to 12 miles from Orlando. The tract was approximately 1,000 yards from the Orlando Sports Stadium and in a sparsely populated area where there were only scattered houses and some citrus groves and farms. This was the first time the location had come to the attention of the agents. They could see that along the road and the two sides running back from the road the tract was fenced with a six-foot chain link fence surmounted by barbed wire one foot high and extending outward from the fence. They observed locked gates in the fence and saw the pickup enter through these gates, after which the gates were relocked. The truck disappeared from view in the dense woods. No structure was visible from outside the fence.

On the same day Agent Williamson arranged to view the area from a Florida Highway Patrol airplane. He observed that the tract was rectangular in shape, approximately 20 acres, all densely wooded, and fenced on all sides with what appeared to be a solid fence, except that at one corner a lake cut into two sides of the property in an arc 300 to 400 yards long, which was unfenced. Near the center of the tract he could see the roof of a building similar to a two-car garage, and the pickup parked next to this structure.

The next day, March 12, there began a series of searches of the fenced tract, terminating in the arrest of two men in the building and a massive seizure, all without warrants. The first entry occurred the afternoon of March 12. Williamson and two other agents

entered the fenced tract at a point where the fence joined the lake, by separating and crawling through barbed wire strands that extended from the termination of the fence toward or into the water's edge, and then wading through marshy area. They positioned themselves in the woods about 75 to 100 feet from the building. They observed that along most of one side there was a garage-type overhead door, and in the rear one normal door, and that the building was windowless. The large door was open, and they were able to see inside the building. They saw what appeared to be a reflection of fire on the inside walls of the building and were able to hear voices, loud banging, and a roar which they identified as that of a blast furnace. They were unable to see anyone or distinguish any conversation. After maintaining surveillance for 45 minutes to an hour, the agents departed the same way they had entered.

On that afternoon, March 12, Williamson considered staging a "raid" on the site, and arranged for the assistance of local law enforcement agencies for that purpose. However, as the person in charge, he decided not to conduct the raid that day.

Entry number two occurred later on March 12, around 7:00 p.m., when it was almost dark. Williamson and one or more others returned by entering through the same place where the fence joined the lake. After they reached the building they were joined by one or two more agents, whose mode of entry is unrevealed. The building was closed and unoccupied and the vehicles were gone. There was an opening in the floor

of an overhanging eave, caused by a piece of the plywood floor of the eave being missing. Williamson climbed a stepladder that was standing against a wall of the building and stuck his head into the opening. With the aid of a flashlight he observed an overhead crane and the frame supporting it, a workbench, a fan, and what appeared to be the rim of a blast furnace or melting pot at the edge of a pit in the floor. Another agent climbed the ladder and made a similar visual examination of the interior of the building. This search required about an hour and a quarter. While it was going on an unidentified vehicle came, and the agents took cover in the woods until it departed.

During the day of March 12, but at a time not stated, some of the federal agents saw the ambulance leave the fenced tract, heavily loaded, and go directly to Resnick's residence.

Early in the morning of March 13, Williamson observed Resnick's DC-3 airplane depart the Orlando airport. He did not know but suspected that it was carrying silver bars. He obtained its flight plan and its destination was determined to be Teterboro Airport, New Jersey, and arrangements were made with federal officers in that area to meet the plane and determine its cargo if possible.[1]

At midmorning of March 13 the third warrantless search began. Williamson and two other agents en-

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[1]The resulting search of the plane is discussed, *infra*.

tered again where the fence joined the lake and took up their positions about 75 feet from the building, which they judged to be approximately 500 yards from the lake. They observed the pickup parked in front of the building and three men working in and about the vicinity of the building. They could see approximately three quarters of the way into the garage and observe activities carried on there. One of the men under observation, later identified as Babcock, departed, returned, and departed again.[1A] Sounds of motors running were heard as well as what the agents thought to be the sound of a blast furnace. They saw eight to ten canvas coin bags lying on the apron of the building. The remaining two men, Davis and Simpson, were observed to cut pieces of copper, take the material to scales inside the building, and then to the rear of the building. Later, just inside the door of the building, they dumped coins out of bags. One of them picked up coins in a scoop and took them to the rear of the building. Davis took empty coin bags to a pit a short distance from the building. Agent Williamson then concluded that they were "in position to raid the site." They directed other law enforcement personnel that were "in position" and with whom they were in radio communication to come to the area of the building. Whether these other officers — federal and local — were positioned within the tract or outside is not shown by the testimony, and, regardless of when they entered, the record is silent on how they did so. After calling these other officers to the scene, the agents at the build-

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[1A]Babcock was acquitted on both substantive and conspiracy charges.

ing site came out of the bushes, entered the open door and arrested Davis and Simpson.

Davis and Simpson were taken outside the building and held in custody for approximately an hour until Babcock returned, when he too was arrested. All three were then taken by agents to Orlando and presented before a United States Commissioner. Meanwhile, commencing with the arrest of Davis and Simpson, agents entered the building, searched it, and took numerous photographs. They found three small furnaces in a pit in the floor, in operation, and coins both sacked and piled on the floor. They seized almost everything in the building, including bags of United States coins, crucibles containing metal thought to have previously been United States coins, molds, a crane, scales, and a generator. They seized various other items outside the building.

Agents found the ambulance parked nearby in the trees, and, after opening the rear door, found a number of rolls of coins in an interior compartment. After Babcock returned in the pickup it too was searched.

While the three suspects in custody were being taken to the United States Commissioner, some of the officers remained at the site, making an inventory, waiting for the hot furnaces to cool, and waiting for transportation for the fruits. The items seized were so numerous, and some of them so large, that Williamson, who accompanied the suspects to Orlando, arranged for a moving van and a three-man crew to go to the scene. When the van arrived, loading the seized items took

approximately an hour and a half, and removal was completed around 8:00 p.m.

In making their entries and surveilling the tract the agents found that from no point on the ground outside the fence could they observe the building. And they observed that the entry gates remained locked except when vehicles were entering and departing.

From the commencement of the investigation and through the arrests and seizure in and around the building on March 13, no application was made to a magistrate or judicial officer for either an arrest warrant for persons thought to be on the premises or for a search warrant for the premises.

Motions to suppress were filed by Resnick, Carlton, Simpson and Davis. The trial judge heard extensive testimony on August 14 and 15, 1969, and on September 9 denied the motion. Subsequently he filed a detailed and careful opinion basing his denial on these grounds: (a) the "open field" doctrine[2] governed the observations made by the agents prior to arrest of Davis and Simpson; (b) after seeing bags of coins emptied, the agents had probable cause to arrest Davis and Simpson; (c) the search from that time on, and the seizures, were incident to the valid arrests.

The trial judge concluded that since *Katz v. U.S.*, 389 U.S. 347, 19 L.Ed. 2d 576 (1967), there has been

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[2] *E.g.*, Hester v. U.S., 265 U.S. 57, 68 L.Ed. 898 (1924); Holton v. U.S., 420 F.2d 302 (5th Cir. 1969); Atwell v. U.S., 414 F.2d 137 (5th Cir. 1969); Hodges v. U.S., 243 F.2d 281 (5th Cir. 1957).

serious question of continued vitality of the open field doctrine, but he elected to follow the post-*Katz* cases of *Fullbright v. U.S.*, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830, 21 L.Ed. 2d 101 (1968), and *U.S. v. Campbell*, 395 F.2d 848 (4th Cir.), *cert. denied*, 393 U.S. 834, 21 L.Ed. 2d 105 (1968), which continued to apply the doctrine.[3]

We conclude that the second and third searches, and the seizures, cannot be sustained. This requires reversal as to all defendants except Carlton. We pretermit decision at this time of the validity of the first search.

In *U.S. v. Pearson*, 448 F.2d 1207 (5th Cir. 1971), this Circuit noted the Supreme Court's emphasis upon the disfavor attached to warrantless searches expressed in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971), quoting from that case the following:

> "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption * * * * that the exigencies of the situa-

[3]On July 10, 1969, this Circuit decided Atwell v. U.S., 414 F.2d 137 (5th Cir. 1969), and on Dec. 18, 1969, U.S. v. Hollon, 420 F.2d 302 (5th Cir. 1969), in both cases applying the open field doctrine without mention of *Katz*.

> tion made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'" (Footnotes omitted.)

448 F.2d at 1211 *quoting* 403 U.S. at 454, 29 L.Ed. 2d at 576. In *U.S. v. Sokolow,* 450 F.2d 324 (5th Cir. 1971) and *U.S. v. Drew,* ____ F.2d ____ (No. 71-1220, Nov. 29, 1971), we have again recognized the stringent burden upon the government of bringing itself within one of the narrowly drawn exceptions and of showing that the exigencies of the situation made it imperative to proceed "outside the judicial process, without prior approval by judge or magistrate." As to the second and third searches that burden has not been met.

Pretermitting whether there were sufficiently exigent circumstances to justify the first warrantless entry, there were no exigent circumstances after that initial incursion. The government then had more than adequate probable cause on the basis of which it could obtain a search warrant, available from the United States District Court in Orlando, 10 miles away. It knew that Resnick had been receiving large and numerous shipments of coins. Government agents knew the pickup truck and the ambulance that were picking up coin shipments and observed them going from the airport to Resnick's home. On March 11 agents had observed the truck pick up a shipment of coins and, heavily loaded, go to Resnick's home and then on to the fenced tract. At the first entry on March 12 the agents had seen a reflection of fire, had identified a roaring sound as the noise of a blast furnace, and had heard the loud banging of metal striking a-

gainst metal. During the day on March 12 the ambulance had been seen leaving the site, heavily loaded, and going to Resnick's home. The unusual security precautions concerning the site were known. We note also Williamson's suspicion when Resnick's plane departed early on the morning of March 13, that it was carrying silver bullion. The suspicion was sufficiently strong that federal officers in the New York-New Jersey area were alerted to meet the plane and attempt to ascertain its cargo, which they did.

In explanation, at the hearing on motions to suppress, Williamson testified that he considered he had no probable cause for either an arrest or search warrant until agents actually observed coins at the site. This is not tenable. Certainty that a crime was being committed at the site was not required, only reasonable cause to believe that it was. And, in any event, the scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer. The interposition of magistrate between officer and citizen to see if there really was probable cause was readily available, and no emergency prevented resorting to him for normal judicial process. It is evident from the testimony at the motion hearing that what the agents were seeking was to find persons at the site engaged in melting coins and to arrest them in the act, and they continued to enter and to search until they found such a state of affairs. This pursuit of an airtight case may have been commendable police work, in the investigatory sense, but it was not an exigent circumstance that would support continued warrantless searches. There is no evidence that equipment

would be destroyed or removed, that participants would flee, or even that use of the premises for smelting would cease. On March 13 the agents, at the scene and warrantless, were, insofar as effective police work was concerned, in the same place and circumstances they would have been had they secured warrants.

The policy of the exclusionary rule which forbids the use at trial of evidence obtained in violation of the Fourth Amendment is not to exclude unreliable evidence or to chastise law enforcement officers or to assist the criminal accused. "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Elkins v. U.S.*, 364 U.S. 206, 217, 4 L.Ed. 2d 1669, 1677 (1960).

A second reason for our conclusion is that the only justification which the government presents for the second entry is the open field rule, and no application of that doctrine sustains the search of the interior of a locked, windowless building, in the nighttime, by agents climbing a ladder, thrusting their heads into a hole in the eaves, and scrutinizing the interior with the aid of a flashlight.

The third search cannot be sustained, for reasons already stated, plus the fact that it was at least in part the fruit of the second search. All items seized at the site when it was raided should have been suppressed.

If the government seeks a retrial, the validity of the initial search should be reconsidered by the District Court in the light of *Coolidge*. Some of the limitations on the plain view exception which that decision describes already have been followed in this circuit in *Sokolow* and *Drew*. The underlying rationales of the plain view rule and the open field doctrine are little, if any, different. As the District Court noted, there is some doubt of the viability of the open field doctrine since *Katz*. Whether it has survived *Coolidge*, and if so in what form, are questions of far-reaching importance to law enforcement. They are not adequately presented to us for decision on this appeal.

The motion of appellant Carlton to suppress the fruits of the searches and the seizures at the fenced site was properly denied. He was not present at the site and claimed no interest in the site or in the property subjected to either searches or to seizures and, therefor, lacked standing to object. *U.S. v. James*, 432 F.2d 303 (5th Cir. 1970), *cert. denied*, ____ U.S. ____, 29 L.Ed. 2d 682 (1971); *Stassi v. U.S.*, 410 F.2d 946 (5th Cir. 1969). The fact that he was a codefendant and an alleged coconspirator and that introduction of fruits of the illegal searches and seizure was damaging to him did not give him standing to object.[4] *Alderman v. U.S.*, 394 165, 171-72, 22 L.Ed. 176, 185-86 (1969); *Stassi v. U.S., supra.*

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[4]This is as true of the first entry as of the second and third, so the fact that we leave open the validity of the first does not affect Carlton.

II. The Search at Teterboro Airport

The validity of this warrantless search of Resnick's airplane turns on whether consent was given by Carlton, a person responsible for the plane. The District Judge found, on conflicting testimony, that Carlton did consent. We cannot say that this was plainly erroneous, which is our scope of review of facts found at a motion to suppress hearing. See *U.S. v. Gunn*, 428 F.2d 1057 (5th Cir. 1970); *U.S. v. Montos*, 421 F.2d 215 (5th Cir.) *cert. denied*, 397 U.S. 1022, 25 L.Ed. 2d 532 (1970). We do not read *Perkins v. Henderson*, 418 F.2d 441 (5th Cir. 1969), to require that an officer state affirmatively that he will not search if permission is refused, or that he cannot and will not search without consent.

III. The Search at Kennedy Airport

Information regarding a suspected shipment of 37 cartons of silver bullion being transported via Eastern Airlines to New York Kennedy Airport was relayed to federal agents in New York from officials in Orlando. Agents arrived at the Eastern Airlines cargo complex on the afternoon of March 13, not having obtained a search warrant. They identified their authority to the Eastern cargo security manager, who took them to the cargo area and to the vicinity of the cartons in question. The agents were not trespassers. Entry into the cargo area, though not open to the public, could be granted by the security manager, the person in charge of the premises. *Corngold v. U.S.*, 367 F.2d 1, 7 (9th Cir. 1966). The District Court held — and we do not find it clearly erroneous — that once inside the

cargo terminal the agents saw the Resnick freight stacked on a cargo pallet, that some of the packages were torn, and that in one they could see a bar of metal which resembled silver. The District Court found, and we accept, that the agents did not tamper with or open any of the cartons. Based on the probable cause of what they had seen, the officers secured a search warrant and seized the silver. The inadvertence requirement of *Coolidge*, would not require suppression. There was no warrantless seizure, only an observation of the freight without intrusion into any protected interest of any defendant, making possible a plain view of contents, followed by issuance of a warrant. The motion to suppress was properly denied as to this seizure.

IV. Revocation of the Treasury Regulation

Approximately two months after the indictments were returned in this case, the regulation issued pursuant to the authority granted in 31 U.S.C. § 395 was revoked. Section 395 provides:

> (a) Whenever in the judgment of the Secretary such action is necessary to protect the coinage of the United States, he is authorized under such rules and regulations as he may prescribe to prohibit, curtail, or regulate the exportation, melting, or treating of any coin of the United States.
>
> (b) Whoever knowingly violates any order, rule, regulation, or license issued pursuant to

> subsection (a) of this section shall be fined not more than $10,000, or imprisoned not more than five years, or both.

The regulation issued thereunder stated:

> Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) or as provided in this part, no silver coin of the United States may be melted, treated, or exported from the United States or any place subject to the jurisdiction thereof. This prohibition shall not apply to any Department or agency of the United States.

31 C.F.R. § 82.1 (1967). The Secretary of the Treasury attempted to qualify his revocation of this regulation by a saving clause which would allow the continuation of all prosecutions pending under the discontinued regulation and the bringing of new prosecutions for violations occurring before the revocation date. 34 Fed. Reg. 7704 (1969).

By motions to dismiss the indictments, the defendants contended that a pending criminal prosecution based on a revoked regulation must be dismissed, and, alternatively, that the Secretary lacked authority to enact a saving clause to a revoked regulation. Disagreeing, the District Court reached only the first contention and held that a pending criminal prosecution based on a regulation revoked after the indictment has been issued need not be dismissed. We agree with the

District Court, and, like it, do not reach the saving clause issue.

Appellants cite cases as recent as *Bell v. Maryland*, 378 U.S. 226, 12 L.Ed. 2d 822 (1964), and as ancient as *U.S. v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801), for the proposition that a prosecution cannot be maintained or continued after the authorizing legislation has been repealed or has expired. But here the authorizing legislation has not been repealed nor has it expired. It is the Act and not the regulation which establishes the crime and fixes the penalty. Only the administrative rule was revoked, a power lawfully delegated to the executive "to fill up the details." *U.S. v. Grimaud*, 220 U.S. 506, 517, 55 L.Ed. 563, 568 (1911). *See also U.S. v. Hark*, 320 U.S. 531, 88 L.Ed. 290 (1944) (indictment for violation of a regulation issued pursuant to an enabling statute and revoked prior to the indictment) and *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 81 L.Ed. 255 (1936). The revocation of the regulation does not bar the prosecution of the defendants in this case.

REVERSED as to appellants Resnick, Davis and Simpson. AFFIRMED as to appellant Carlton.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29706

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ERROL B. RESNICK, ROBERT JAY CARLTON,
JOHN THOMAS SIMPSON and
JOHN PHILLIP DAVIS,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Feb. 3, 1972, 5 Cir., 1972, ____ F.2d ___).

(June 2, 1972)

Before GODBOLD, SIMPSON and CLARK, Circuit Judges.

PER CURIAM: The petition for rehearing of appellant Carlton is DENIED.

With respect to the search and seizure at Kennedy Airport, our opinion concluded that the motion to suppress was properly denied. The government now concedes that if the government seeks a retrial of those defendants whose convictions are reversed, the trial court should consider whether the search and seizure at Kennedy was tainted by any illegal search in Florida. In view of this concession, with which we agree after reexamination of the record, our opinion is modified accordingly.[1] In all other respects the petitions for rehearing of appellants Resnick and Simpson are DENIED.

No member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, FRAP; Local Fifth Circuit Rule 12) all petitions for rehearing en banc are DENIED.

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[1]Appellant Davis did not file a petition for rehearing. However, in the event of his retrial he should be extended the benefit of the government's concession.